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In The
# Supreme Court of the United States
October Term, 1986

BESSIELOVE LEE,

*Petitioner,*

v.

UNION ELECTRIC COMPANY, a corporation, and UNION ELECTRIC RETIREMENT PLAN,

*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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## STATEMENT OF THE CASE

Petitioner Bessielove Lee brought this action against Union Electric Company[1] (the Company) and the Union Electric Retirement Plan (the Plan) seeking damages equal to a 50% survivor annuity. Mrs. Lee's husband died at age 61 while employed by the Company. He had not elected survivor benefits which would have provided annuity payments to his wife in the event of his death before retirement. Mrs. Lee claimed that Respondents failed to adequately inform her husband of the need for such an election. The District Court held that the information supplied to Mr. Lee adequately explained the need for an election. The Eighth Circuit affirmed the District Court's judgment.

The Petition omits some facts on which the District Court and the Eighth Circuit relied and which are relevant to this Petition. A summary of those facts follows.

The 1974 Union Electric Retirement Plan provided that the regular method of payment of retirement benefits was a life annuity with monthly payments until the death of the employee. In the alternative, an employee could elect the Contingent Annuity Option, under which the employee agreed to receive a reduced retirement income during his or her life and designated an annuitant to receive, upon the employee's death, a life annuity amounting to 100%, 75%, 50% or 25% of the employee's pension benefits. A Contingent Annuity Option could not become effective until the latter of (1) the employee's fifty-fifth birthday, or (2) two years after the date of the election.

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[1]Union Electric Company has no parent company and no subsidiaries other than a wholly-owned subsidiary. Rules of the Supreme Court of the United States, Rule 28.1.

On June 28, 1974, a few months before his fifty-third birthday, Mr. Lee received a packet of information from the Company notifying him of his eligibility to elect the Contingent Annuity Option. In addition to the letter explaining the option, the information packet contained a statement of Mr. Lee's plan benefits; an explanatory booklet on the Contingent Annuity Option, with examples of how the option operated; a Notice of Election form and a sample completed Notice of Election form; and a form on which the employee could request further information.

The letter accompanying the information packet explained that the Contingent Annuity Option allowed an employee to provide for a portion of his retirement income to be paid after his death to his chosen annuitant. If this option were elected, the employee would receive a smaller pension when he retired. The letter stated:

> (b) *You may elect the Option to be in effect as early as your 55th birthday and before you retire.* If the Option is in effect and you die before you retire, and if your Contingent Annuitant survives you, she (he) would be paid a monthly pension for the remainder of her (his) life. Such monthly pension would be a percentage as specified in your elected Option of the pension that would have been paid to you if you had lived and retired on the first of the month folowing your death; . . .

The letter also stated:

> The decision to elect the Option or not is a matter of personal judgment to be based on your particular circumstances and objectives. The election and operation of the Option is a complex matter and you may want more information before you decide to elect it or not. If so, we will be glad to review it with you at your convenience. (See Opinion, Appendix, A9-A10)

The explanatory booklet included in the packet explained the Option in a question and answer format and provided specific examples of its operation and effect. (Opinion, A10-A11) Under the heading "*What if I die before I retire?*" the booklet stated:

> *If the Option is in effect,* and you die before you retire, a monthly payment, starting as of the first of the month after your death, would be made to your "Contingent Annuitant" if she (he) is still living. The monthly payment would continue for the life of your "Contingent Annuitant" and would amount to the percentage, as elected by you, of the pension that would have been paid to you if you had lived and retired on the first of the month following your death. (See example III attached.) (Emphasis in original.)

Mr. Lee did not respond to this mailing, and the Company sent him a follow-up letter dated August 15, 1974, reminding him of the Option and requesting that he inform the Company whether he wished to elect the Option or had any further interest in it. A self-addressed envelope was enclosed with the letter which again stressed the importance of the election and advised Mr. Lee of the Company's willingness to provide further information. (Opinion, A11-A12)

The Company never received a Notice of Election or any other response from Mr. Lee, nor did the Company ever receive any proof of age for a Contingent Annuitant from Mr. Lee, as required by the Notice of Election.

In October 1975, the Company mailed a memorandum to its employees summarizing changes to be made in the Retirement Plan to comply with ERISA. The memorandum stated:

> The payment of retirement income provisions will be amended to provide that the *normal* form of annuity payment will be a qualified spouse benefit with the 50% Contingent Annuity Option in effect at retirement, provided the employee is married prior to the initial date of commencement of benefit payments. All other provisions now contained in the Plan which define the terms and conditions of the Contingent Annuity Option will be continued. It will be amended, however, to provide that a participant may elect, upon proper notice to the Company, to receive his benefits under the life annuity option of the Plan without a spouse benefit. (Opinion, A12-A13).

The changes became effective January 1, 1976, and a summary plan description was issued by the Company in November of 1977. The summary identified the normal method of payment of retirement income for married employees as the "50% Contingent Annuity Option." The summary identified as an optional form of payment, which could be elected, the "Contingent Annuity Option", which "enables you to provide 25%, 50%, 75% or 100% of your Retirement Income to be payable after your death, to the person you name as your Contingent Annuitant . . ." (A78-A83) The summary stated that this option could be elected to become effective as early as the employee's fifty-fifth birthday. (A79-A80)

In 1981, the names of the retirement payment methods were changed. The 50% Contingent Annuity Option was renamed the "50% Survivor Benefit Option" and the Contingent Annuity Option was renamed the "Survivor Benefit Option." The September 1982 summary plan description, excerpts from which are quoted in the Petition and Appendix (A69-A76), used the new names for these forms of payment but otherwise employed essentially the same lan-

guage used in the 1977 summary to explain the options. The 1982 Summary Plan Description again described the survivor benefit option for employees aged 55 to 65 as an option which "may be elected by you."

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## REASONS FOR DENYING THE WRIT

The issue presented to the District Court and the Eighth Circuit in this case was whether Mr. Lee, who had not made the election and who died while employed by the Company, had been adequately advised of the need to make an election if he wished to provide an annuity for a beneficiary in the event of his death prior to retirement. The District Court held that the summary plan description satisfied the requirements of ERISA, 29 U.S.C. § 1022(a) and that Mr. Lee was adequately advised concerning the need for an election. (District Court Memorandum, A45-A48) The decision of the Eighth Circuit affirming the judgment on the merits was correct and should not be disturbed.

The decision of the Eighth Circuit is not in conflict with that of any other circuit, nor does this case raise any important question of federal law which requires consideration by this Court.

This case is not significant and can have no precedential value because of the 1984 Amendments to ERISA. As amended, 29 U.S.C. § 1055, applicable to plan years beginning after December 31, 1984, provides that every payment of pension plan benefits must be in the form of an annuity which will benefit the participant's surviving

spouse, unless the participant elects otherwise, with the spouse's written and witnessed consent.

Contrary to Petitoner's suggestion, the Eighth Circuit did not set any standard for proof of reliance in ERISA cases. The court squarely stated that its decision rested on its determination that the summary plan description adequately explained the need for an election. (Opinion, A26-A27) It simply noted in addition that had the summary plan description been found to be inadequate, plaintiff would still have faced a significant barrier to recovery, because of the difficulty in showing prejudice flowing from the summary when plaintiff's husband, having received two letters and many other materials concerning the option, had expressed no interest in it at all. (Opinion, A27) Petitioner's suggestion that this Court adopt a presumption of reliance similar to that applied in some federal securities law cases is not only inapposite but addresses a matter neither decided by the Eighth Circuit nor essential to its decision.

## I

## THE EIGHTH CIRCUIT PROPERLY AFFIRMED THE DISTRICT COURT'S HOLDING THAT THE SUMMARY PLAN DESCRIPTION WAS ADEQUATE AND THE EMPLOYEE WAS ADEQUATELY ADVISED OF THE PLAN PROVISIONS, AND THIS CASE DOES NOT PRESENT ANY IMPORTANT QUESTION OF FEDERAL LAW REQUIRING THE CONSIDERATION OF THIS COURT

The question of whether any summary plan description is adequate necessarily depends upon the particular wording of the summary description at issue, so that each

such determination is necessarily fact-specific and can provide very little precedential value or guidance for determining the adequacy of any other summary plan description.

The Eighth Circuit, having considered the language of this particular summary plan description and having reviewed the findings of fact and conclusions of law made by the District Court, determined that the summary plan description adequately explained the need for an election. The summary repeatedly referred to the need to elect the option and used such terms as:

> If you *elect* the option .... (A72)
> You may not *elect* this option for a person other than your spouse if by such election your retirement income would be reduced to less than 51% of normal value at age 65. (A72-A73)
>
> This option *may be elected* at any time before your Normal or Early Retirement Date. (A73)
>
> . . . it may not become effective until the later of (1) your 55th birthday, or (2) two years after the *date of election.* (A73)
>
> (Emphasis supplied)

Since the summary plan description repeatedly referred to the need to make an election, it was not necessary that the summary also state that if no election were made, the benefits of the option would not be available. The Eighth Circuit properly held that the summary plan description satis-

fied 29 U.S.C. § 1022 (a) and adequately explained the need for an election.[2]

The decision in this case can be expected to be of no significance in future determinations of the adequacy of summary plan descriptions, not only because the decision turned on the particular wording of this summary plan description, but because the election involved in this case has been abolished by the amendment to 29 U.S.C. § 1055. The amendment makes a survivor annuity automatic, even in the case of an employee's death prior to retirement, unless the employee has elected to waive the survivor annuity form of benefit, and his spouse has consented in writing to such waiver, and her consent has been witnessed by a plan representative or notary public.

Petitioner suggests that notwithstanding this amendment, the importance of assuring complete information requires this Court's consideration of this case. (Petition, p. 27) However, because the decision in this case necessarily depended upon the facts of this case and the language of the particular summary plan description at issue, this decision cannot be expected to affect the outcome of any other case or to affect the participants and beneficiaries of any other retirement plan. The Eighth Circuit properly de-

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[2]Petitioner attempts to make much of the fact that the Eighth Circuit's opinion as initially issued referred in one paragraph to the "plan" rather than to the "summary". (Petition p. 17). This is obviously an oversight of no significance. As noted above, the summary plan description did repeatedly refer to the need for an election, and the Court referred in the same paragraph and elsewhere in its opinion to the adequacy of the summary plan description. The oversight was corrected by the Court on its own motion.

cided this case under the law on the record before it, and its judgment should not be disturbed.

## II

## THE EIGHTH CIRCUIT DID NOT PURPORT TO SET A STANDARD FOR PROOF OF RELIANCE IN ERISA CASES, AND THE SECURITIES LAW CASES RELIED ON BY PETITIONER ARE INAPPOSITE

Petitioner suggests that this Court should adopt a standard of proof on the issue of reliance similar to that adopted in certain federal securities law cases, in particular *Mills v. Electric Auto-Lite Company,* 396 U.S. 375 (1970), and *Affiliated Ute Citizens v. United States,* 406 U.S. 128 (1972). That argument must be rejected for two reasons.

First, the Eighth Circuit's decision does not depend upon any consideration of reliance or lack of reliance. The opinion states:

> Our decision rests on our determination that the summary plan description adequately explains the need for an election. (A26-A27)

The court then added:

> We think it is appropriate to note, however, that even had we found that the summary plan description was inadequate, the absence of any indication that Mr. Lee expressed any interest in the Survivor Benefit Option, despite the repeated opportunities to do so, would pose a significant barrier to recovery. To secure relief on the basis of a faulty summary plan description, the claimant must show some significant reliance on, or possible prejudice flowing from the summary. See *Govoni v. Bricklayers,* 732 F.2d 250, 252 (1st. Cir.

1984); *Hillis v. Waukesha Title Co., Inc.*, 576 F.Supp. 1103, 1109-10 (E.D. Wis. 1983).

The court's comment and its reference to the *Govoni* and *Hillis* cases do not, as Petitioner suggests, amount to a holding that plaintiff must prove directly that the deceased employee was misled. (Petition p. 25) Nor did the Eighth Circuit, as Petitioner suggests, impose a standard that "hardly anyone could meet." (Petition p. 25) The principle that there must be some showing of causation between the plan description and the injury complained of has been recognized in many cases, including those cited in the opinion. However, the Eighth Circuit did not impose any standard for proof of reliance, because as it clearly stated, its decision affirming judgment in favor of Respondents and against Petitioner was based on its determination of the adequacy of the summary plan description. The court's comment on the particular fact circumstances here, in which the plan participant expressed absolutely no interest in this option, did not determine the outcome of this case and cannot be expected to affect any other case.

In addition, neither of the federal securities law cases on which petitioner relies is or should be applicable to the present case or to ERISA cases in general. In *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), the court held that if a proxy solicitation is found to be defective in that it is materially misleading, and if the plaintiff proves that the proxy solicitation itself was an essential link in the accomplishment of the transaction for which the proxy was delivered, such proof satisfies the requirement of causation between the defect and the transaction, and he need not prove in addition that the particular defect in the solicitation material caused the transaction.

In the present case, neither the summary plan description nor the materials furnished to Mr. Lee in 1974 and thereafter were materially misleading. Either individually or in combination, the summary plan description and other materials adequately advised Mr. Lee concerning the opportunity to elect an annuity to be paid to his spouse in the event of his death prior to retirement and of the need to make such an election and have it become effective. There is no evidence to support Petitioner's suggestion that her husband was "positively misled." (Petition p. 20) As the Eighth Circuit observed, the District Court noted that although there was testimony that Mr. Lee had stated that Mrs. Lee would receive a percentage of his retirement benefits, the witness who so testified stated that Mr. Lee had said Mrs. Lee would receive the benefits *if and when he retired.* (Opinion, A26) That is exactly what would have happened, since no election of pre-retirement benefits had been made.

In *Affiliated Ute Citizens v. United States,* 406 U.S. 128 (1972), the court held that plaintiffs could make a submissible case of securities fraud without specifically proving reliance on defendant's fraudulent failure to disclose that they were in effect acting as market makers for themselves and others with respect to plaintiffs' interests in tribal property. That decision has no application here, where there was no omission and certainly no fraud.

These securities law decisions are simply inapposite to ERISA cases, and in any event, this case is not a suitable vehicle for presentation of the question whether some particular standard for proof of reliance should be adopted in

ERISA cases, because the decision in this case did not turn on a determination of reliance or lack thereof.

## CONCLUSION

For the foregoing reasons, this case does not present any questions of general importance which should be considered by this Court, and the Petition for a Writ of Certiorari to review the judgment and opinion of the Eighth Circuit should be denied.

Respectfully submitted,

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